

## **Board of Chiropractic Examiners (BCE)**

### **INITIAL STATEMENT OF REASONS**

**Hearing Date:** None

**Subject Matter of Proposed Regulations:** Omnibus Consumer Protection Regulations

**Sections Affected:**

The proposed regulations would amend Sections 303, 304 and 308 and add Section 304.5, which are contained in Article 1 in Division 4 of Title 16 of the California Code of Regulations (CCR). Furthermore, the proposed regulations would add Sections 317.2, 317.3, 317.4, which are contained in Article 2 in Division 4 of Title 16 of the CCR, add Section 321.1, which is contained in Article 3 in Division 4 of Title 16 of the CCR, and add Sections 390.7, 390.8, and 390.9, which are contained in Article 9 in Division 4 of Title 16 of the CCR.

**Introduction:**

The Chiropractic Initiative Act Section 1000 – 4(b) authorizes the Board to adopt regulations as they may deem proper and necessary for the performance of its work, the effective enforcement and administration of this act, the establishment of educational requirements for license renewal, and the protection of the public.

In July of 2009, a series of articles appeared in the Los Angeles Times newspaper pointing out consumer protection issues and findings of egregious licensee misconduct at a specific healing arts licensing board within the Department of Consumer Affairs (DCA). The articles addressed systemic problems with the manner in which the targeted DCA board managed complaints, investigations, disciplinary actions, and probation monitoring.

Based on these findings, the BCE held a series of meetings to review its existing enforcement processes for potential similar problems and brainstorm solutions and goals for improvement within the BCE. This review uncovered some similar concerns due to legal, procedural, and inadequate resources that limit the BCE's ability to investigate and act on cases in a timely manner and identified areas that could be improved for closer alignment with the BCE's consumer protection mandate.

This proposal would make regulatory changes to enhance the BCE's enforcement and administrative processes by defining terms in regulation, establishing reporting and disclosure requirements, and amending regulations specific to its disciplinary guidelines and applicant requirements. These changes would increase the BCE's enforcement authority and access to critical information for use in investigations and improve efficiency in enforcement processes and procedures for enhanced consumer protection.

## **Specific Purpose and Factual Basis of each adoption, amendment, or repeal:**

### **Section 303 is amended:**

This section currently requires licensees to file the address of their current place of practice and all other sub-offices with the Board. It further requires the licensee to notify the Board of any changes of place of practice, giving the Board both the old and new address within 30 days of the change.

In addition to the requirements above, the proposed amendment to this regulation would establish a similar requirement for licensees to file a current and accurate e-mail address with the Board and notify the Board of any and all changes of the e-mail address within 30 days of the change, giving the Board both the old and the new address. This amendment is necessary to facilitate communications by the Board with its licensees in a cost-effective manner.

### **Section 304 is amended:**

This section sets forth grounds for disciplinary action of a license or denial of a chiropractic license for revocation, suspension, or other discipline by another state of a license or certificate to practice chiropractic, or any other health care profession for which a license or certificate is required. The proposed amendment would expand the grounds for disciplinary action of a license to include any disciplinary action taken against a licensee by another licensing entity or authority of this state, or of another state, or of an agency of the federal government, or the United States Military, or a foreign government and establish disciplinary action based on these grounds as unprofessional conduct.

This amendment is necessary to allow the board to take action against a licensee or applicant on the grounds of prior discipline rather than the underlying violation which resulted in prior discipline by another jurisdiction, thereby circumventing the lengthy process of building a case based on circumstances surrounding the violation.

### **Section 304.5 is added:**

This section would establish a requirement for the Board to conduct a search on the National Practitioner Data Bank (NPDB) and the Healthcare Integrity and Protection Data Bank prior to granting or renewing a license. The NPDB is a confidential repository of information related to the professional competence and conduct of physicians, dentists and other health care practitioners. The NPDB establishes reporting requirements for Boards of Medical Examiners, hospitals, health care entities, health care practitioners and professional societies which take adverse licensure action or professional review actions and entities making payments as a result of medical malpractice actions or claims. The NPDB enables individuals or entities to identify and discipline health and healing arts professionals who engage in unprofessional behavior. This requirement is necessary to ensure that the Board receives full disclosure and discovery of prior medical malpractice payment and adverse action history to ensure competency of the applicant prior to issuance of a chiropractic license.

**Section 308 is amended:**

This section currently specifies license posting requirements for doctors of chiropractic. This section is amended to address the type of license and license posting requirements for chiropractors who practice in a mobile setting. Specifically, this section exempts chiropractors who practice in a mobile setting (i.e. health fairs, sporting events, patient's homes) from the requirement of obtaining and displaying a satellite certificate and instead requires the chiropractor to carry a current and active pocket license and have the pocket license available for inspection upon request of a representative of the Board or a member of the public. This section is further amended to prohibit a licensed Doctor of Chiropractic from displaying an inactive or invalid chiropractic license, certificate or registration. These changes are necessary to ensure that the public can easily discern the chiropractor's authority to practice chiropractic.

**Section 317.2 is added:**

This section would prohibit a licensee from including provisions in any agreement to settle a civil dispute arising from the licensee's practice, which would prohibit another party to the agreement from filing a complaint with the Board or require them to attempt to withdraw a complaint filed with the board. This section further defines a violation of this section as unprofessional conduct and gives the board authority to take disciplinary action of a licensee for such violations.

Business and Professions Code (BPC) Section 2220.7 provides a similar prohibition for physicians. The use of "gag clauses" can delay or thwart the Board's effort to investigate alleged cases of misconduct, thereby preventing the Board from fulfilling its consumer protection mandate. The increasing use of gag clauses to prevent regulatory agencies from investigating licensees is contrary to good public policy and allows unscrupulous or negligent professional licensees to continue to harm the public. This regulation would put consumers first and is necessary to prevent those licensees from escaping the professional repercussions of their actions.

**Section 317.3 is added:**

This section would require licensees to report to the Board the bringing of an indictment or information charging a felony against the licensee; convictions, including any verdict of guilty, or plea of guilty or no contest, of any felony or misdemeanor; and disciplinary action taken by another licensing entity or authority of this state, or another state, or an agency of the federal government. This section further requires the report to be made in writing within 30 days of the date of the bringing of the indictment or charging of a felony, the conviction or disciplinary action and establishes the licensee's failure to report, pursuant to this section, as unprofessional conduct.

BPC Section 802.1 sets forth similar reporting requirements for physicians and surgeons, osteopathic physicians and surgeons, and podiatrists. Currently, the Board requests this information on the licensee's annual license renewal form and receives subsequent arrest reports from the Department of Justice. This reporting requirement is necessary to ensure the Board receives full disclosure of a licensee's criminal

activity immediately following indictments or charges of criminal activity to allow the Board to investigate the matter in a more expedient manner.

**Section 317.4 is added:**

This section would require any licensee who is an employer of a licensed chiropractor to report to the board the suspension or termination for cause, or any resignation in lieu of suspension or termination for cause of any licensed chiropractor in its employ within 15 business days. This section further defines “suspension or termination for cause” or “resignation in lieu of suspension or termination for cause” as resignation, suspension or termination from employment for the use of controlled substances or alcohol to the extent that it impairs the licensee’s ability to practice safely, the unlawful sale of controlled substances or other prescription items, patient or client abuse, neglect, physical harm, or sexual contact with a patient or client, gross negligence or incompetence, and theft from a patient, or client, or any other employee or the employer. The terms “gross negligence” and “incompetence” are also defined. Lastly, this section establishes the employer’s failure to report, pursuant to this section, as unprofessional conduct and grounds for suspension or revocation of his or her license and asserts the board’s authority to cite and fine a licensee for any violation of this section.

Similar reporting requirements exist for vocational nurses and psychiatric technicians in BPC Section 2878.1 and respiratory care therapists in BPC Section 3758. The Medical Board, Board of Podiatric Medicine, Board of Behavioral Sciences, Board of Psychology and Dental Board have more extensive reporting requirements for peer review bodies and hospitals which are specified in BPC Section 805. This reporting requirement will allow the board to investigate misconduct which does not result in an arrest or conviction and prohibit chiropractors from moving from one practice to another when such misconduct occurs. The board believes chiropractors should be held to the similar reporting requirements as other health care professionals to ensure the competency of its licensees and protection of the public.

**Section 321.1 is added:**

This section would allow the Board to order an applicant for licensure, who may be unable to safely practice chiropractic due to a mental illness or physical illness, to be examined by one or more physicians and surgeons, chiropractors, or psychologists designated by the board. The full cost of such examination shall be paid by the Board. Additionally, this section establishes the Board’s authority to render an application incomplete for an applicant’s failure to comply with such order or to deny an application if the report of evaluation determines that the applicant is unable to practice chiropractic safely and requires the board to furnish the applicant with a copy of the evaluation report.

Existing law (BPC Section 480) allows the Board to deny a license on various grounds, including conviction of a crime, commission of any crime involving dishonesty, fraud or deceit or commission of any act which constitutes grounds for suspension or revocation of the license. Currently, the Board can compel a licensee to submit to a psychological or physical examination when the licensee’s fitness to practice is compromised based on suspected mental illness; however, this authority does not apply to applicants for licensure. Although the Board has the authority to

deny an applicant a license for acts defined in BPC Section 480, the board lacks authority to deny a license application or compel an applicant to submit to a psychological or physical examination when the person's fitness to practice is compromised based on suspected mental or physical illness. The proposed language is needed to institute the Board's authority to require assessment of applicants who may be mentally or physically impaired and deny their application if results of the assessment render them incompetent. The proposed regulation is necessary to protect the public from incompetent chiropractors.

**Section 390.7 is added:**

This section would authorize the Board to enter into a settlement with a licensee or applicant prior to the Board's issuance of an accusation or statement of issues against the licensee. This section would require the settlement to include language identifying the factual basis for the action being taken and a list of statutes or regulations violated. It further specifies that a person who enters into a settlement, pursuant to this section, would not be precluded from filing a petition within the allotted timeframe to modify the terms of the settlement or petition for early termination of probation, if probation is part of the settlement. Lastly, this section would consider settlements executed pursuant to this section as discipline and a public record would be posted on the Board's Internet Web site.

The Administrative Procedure Act requires a board to file an accusation or statement of issues against a licensee or applicant before the board can reach a stipulated settlement with the licensee. Such a stipulated settlement could include revocation, surrender, probation, citation and fine, or any other form of discipline. Some licensees may be willing to agree to a stipulated settlement earlier on in the investigation stage of the enforcement process, thus saving the board and the individual the additional time and expenses associated with filings of accusations or statements of issues. This language is necessary to provide the Board with a more expedient and cost-effective means of discipline for licensees and applicants who agree to such terms than the adjudicative proceedings currently in place.

**Section 390.8 is added:**

This section would require any proposed decision or decision that contains any finding of fact that the licensee engaged in any act of sexual contact, as defined in Section 729(c) of the BPC, issued in accordance with the procedures set forth in Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, to contain an order of revocation. A proposed decision shall not contain a stay of the revocation.

This language is similar to language which currently exists for physicians (BPC Section 2246), for psychologists (BPC Section 2960.1), for respiratory care therapists (BPC Section 3752.7), for marriage and family therapists (BPC Section 4982.26), and for clinical social workers (BPC Section 4992.33). Additionally, California Code of Regulations Section 316(c) establishes the Board's authority to take disciplinary action against a licensee for commission of any act of sexual abuse, sexual misconduct, or sexual relations with a patient, client, customer or employee. Under existing law, the Board can file an accusation to discipline the licensee. However, if the case goes to hearing, the Administrative Law Judge may issue a proposed decision which may or

may not include the same discipline sought by the Board.

Due to the seriousness of sex offenses and the potential threat to consumers that sex offenders pose, the Board believes that a mandatory penalty of revocation for any act of sexual contact as defined in BPC Section 729(c) is necessary to protect the public from acts of sexual misconduct by a licensee and possibly serve as an effective deterrent to licensees for commission of these acts.

**Section 390.9 is added:**

This section would require the Board to deny an application for licensure or revoke a license for an individual who is required to register as a sex offender pursuant to Section 290 of the Penal Code, or the equivalent in another state or territory, under military law, under federal law, or under a foreign jurisdiction. This section would prohibit the Board from reinstating or reissuing the individual's license, issuing a stay of license or placing the license on probation. This section would not apply to individuals who have been relieved under Section 290.5 of the Penal Code of his or her duty to register as a sex offender or whose duty to register has been formally terminated under law, an individual who is required to register as a sex offender pursuant to Section 290 of the Penal Code solely because of a misdemeanor conviction under Section 314 of the Penal Code. However, nothing in subparagraphs (2) or (3) shall prohibit the Board from exercising its discretion to deny or discipline a license under any other provision of state law. This section would not apply to any administrative adjudication proceeding under Chapter 5 (Commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code that is fully adjudicated prior to the effective date of this regulation. Lastly, this section specifies that a petition for reinstatement of a revoked or surrendered license shall be considered a new proceeding and the prohibition against reinstating a license to an individual who is required to register as a sex offender applies.

Current law gives the board authority to take action against a licensee for the commission of sexual abuse, sexual misconduct, or sexual relations with a patient, client, customer or employee. This section broadens the Board's authority for discipline against applicants and licensees for any act of sexual misconduct with anyone which resulted in a requirement for the individual to register as a sex offender. The proposed language is necessary to establish the board's authority to protect the public from registered sex offenders.

Because of the seriousness of sex offenses and the potential threat to consumers that sex offenders pose to consumers, the Board believes it is necessary to establish a mandatory penalty of revocation in any disciplinary matter for chiropractic applicants or licensees who are registered sex offenders.

Underlying Data:

Board Meeting Minutes – September 23, 2010 (Proposal Approved)

Business Impact:

The Board has determined that this regulatory proposal will not have a significant adverse economic impact on businesses. This initial determination is based on the following facts or evidence/documents/testimony:

The proposed regulations specifically mandate reporting and disclosure requirements for licensees and applicants and establish the Board's authority for discovery related to discipline or criminal activity and mandates for discipline or denial of licenses. There would be no costs required to comply with the proposed regulations.

Specific Technologies or Equipment:

This regulation does not mandate the use of specific technologies or equipment.

Consideration of Alternatives:

No reasonable alternative to the regulation would be either more effective in carrying out the purpose for which the action is proposed, or would be as effective and less burdensome to affected private persons than the proposed regulation.